(9)

No. 84-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONERS

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
Attorneys for Celanese Corporation of America, et al.

J.D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
Attorneys for C.H. Albright, et al.

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, S.C. 29730
(803) 324-5151
Attorneys for Springs Mills, Inc., et al.

JAMES D. ST. CLAIR *
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, Mass. 02109
(617) 742-9100
Attorneys for the State of South Carolina, et al.

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, S.C. 29211
(803) 758-3970
Attorneys for the State of South Carolina

* Counsel Of Record For Each Petitioner

July 18, 1985 (page-proof copy)
September 13, 1985 (final copy)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

68 pp

QUESTIONS PRESENTED

Whether a four-to-three majority of the Fourth Circuit Court of Appeals erred in holding:

(1) That the Catawba Indians are immune from state statutes of limitations even though a 1959 federal statute terminated any trust relationship between the Catawbas and the United States and explicitly provides that "the laws of the several states shall apply to them in the same manner they apply to other persons?"

(2) That the Catawba Indians may claim a special legal status under federal law—which would bind the United States as their trustee, permit them to act as a sovereign entity, and enable them to assert a claim that accrued 140 years before the filing of the complaint—even though a 1959 federal statute explicitly provides that "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians" and provides that federal Indian statutes "shall not apply to them?"

PARTIES IN THE COURT OF APPEALS

Seventy-six named defendants [1] are alleged to represent a defendant class of 27,000 current landowners.[2] The

---

[1] The named defendants are the State of South Carolina, Richard W. Riley as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater Carolina Company, Division of Bowater Incorporated; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills, Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright, Ned Albright; J.W. Anderson, Jr., John Marshall Walker II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson; W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron, Wilson Barron; Archie B. Carrol, Jr.; Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris, Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.D. Reid, Jr.; Will R. Simpson, John S. Simpson, Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Good, R.N. Bencher, W.O. Nisbet III; Pauline B. Gunter; J. Max Hinson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin; Robert M. Yoder.

[2] A motion to certify the alleged class was filed, but the district court stayed consideration of it pending the ruling on defendants' motion to dismiss or for summary judgment. The district court dismissed the action without deciding the motion for class certification.

named defendants include individuals, a family trust, a religious organization, private companies, local government organizations and the State of South Carolina. The plaintiff is The Catawba Indian Tribe, Inc., a non-profit organization incorporated in 1975 under South Carolina law, and operated by persons claiming to be descendants of Catawba Indians.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTION

TREATIES

TABLE OF AUTHORITIES—Continued

FEDERAL LEGISLATION

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

STATE LEGISLATION

OTHER AUTHORITY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-782

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF PETITIONERS

OPINIONS BELOW

The decision of the United States District Court for the District of South Carolina (the Honorable Joseph P. Willson sitting by designation of the Chief Justice) is unreported but appears in the Appendix to the Petition for Certiorari ("Pet. App.") at 35a-53a. The single paragraph *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, is reported at 740 F.2d 305 (4th Cir. 1984), together with a concurring opinion. Pet. App. at 1a-3a, 29a-34a. The majority and the dissenting opinions of the original three-judge panel, adopted respectively by the majority and minority of the court of appeals sitting *en banc*, are reported at 718 F.2d 1291-1303 (4th Cir. 1983). Pet. App. at 4a-28a.

JURISDICTION

This Court has jurisdiction to review the final decision of the court of appeals under 28 U.S.C. § 1254(1) (1982), pursuant to a timely-filed Petition for Writ of Certiorari which was granted June 3, 1985.

STATUTE TO BE CONSTRUED

The decision below required the construction of a 1959 act of Congress, Public Law 86-322 (Sept. 21, 1959), 73 Stat. 592 (1959), 25 U.S.C. §§ 931-938 (1982). Pet. App. at 54a-59a. Section 5, the principal focus of analysis provides:

> The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

73 Stat. at 593.

STATEMENT OF THE CASE

I. The Parties And The Land In Issue.

The Catawba Indian Tribe, Inc. is a non-profit organization incorporated in 1975 under South Carolina law and operated by persons claiming to be descendants of Catawba Indians ("the Catawbas" or "the respondent"). The respondent claims the current right to own and possess approximately 144,000 acres (225 square miles) of land at the northern border of South Carolina in York,

Lancaster, and, perhaps, Chester Counties, and seeks trespass damages from 1840 to the present.

The land in issue encompasses the city of Rock Hill, the town of Fort Mill and a number of smaller communities. Thousands of families, as well as small businesses, farms, trusts, lending institutions, manufacturers, churches, charitable organizations, local governments and the State of South Carolina, currently hold record title to or other interests in that land. Seventy-six individuals, companies and public entities are named as defendants ("the current landowners" or "the petitioners") and as representatives of an uncertified putative defendant class alleged to consist of 27,000 "persons who assert an interest in any portion of the subject lands." [1]

II. The Nature Of The Claim.

The Catawbas claim that their ancestors occupied the land in issue "from time immemorial" and that their ownership was recognized and confirmed by treaties with Great Britain in 1760 and 1763.[2] Neither the 1760 nor the 1763 treaty prohibited the Catawbas from transferring their interest in the land in issue.[3] In 1840, the Catawbas voluntarily transferred any interest they held in that land to the State of South Carolina by the Treaty of Nation Ford.[4] In return, the 1840 treaty provided

---

[1] Complaint ¶ 8 (R. Vol. I, N.R. 1). (J.A. 20).

[2] Complaint ¶¶ 4, 12-14 (R. Vol. I, N.R. 1) (J.A. 19, 21-22). The United States, however, has never entered into any treaty with the Catawbas.

[3] No copy of the 1760 treaty has been discovered by the parties, but the respondent does not suggest that any provision of that treaty has been violated. Nothing in the 1763 treaty prohibited the Catawbas from alienating the land referred to in the treaty or prohibited any person from acquiring that land. Treaty of Augusta, November 10, 1763, Colonial Records of North Carolina, XI at 199 (R. Vol. V-VI, Ex. 6) (J.A. 32).

[4] The 1840 Treaty of Nation Ford (R. Vol. V-VI, Ex. 12) (J.A. 38). Well before the 1840 treaty, the Catawbas had leased their

that the state should purchase new land for the Catawbas in a less populated region and should make monetary payments to them over the span of ten years.[5]

The Catawbas nevertheless contend that they can void their ancestors' voluntary transfer of their interest in this land because federal approval of or consent to the 1840 transfer was required by a federal statute known as the Nonintercourse Act[6] and such approval or consent allegedly was lacking. According to the Catawbas, that alleged lack of federal approval or consent is sufficient to destroy the titles of the 27,000 landowners who trace their titles to the State of South Carolina.

III. The Catawba Termination Act And The Decisions Below.

In 1959, during a period when the declared goal of federal Indian policy was to end the segregation of Indians from the rest of society,[7] Congress enacted a statute commonly referred to as the Catawba termination act, 73 Stat. 592 (1959), 25 U.S.C. §§ 931-938 (1982). That act explicitly declares that state law shall apply to the Catawbas, that all federal Indian statutes shall not apply to the Catawbas, and that special federal services for

---

interest to non-Indians under long-term leases and had ceased to occupy the land in dispute. (R. Vol. V-VI, Ex. 38).

[5] *Id.* In 1842 the State of South Carolina purchased land for the Catawbas which the state continues to hold for them. The district court's opinion describes more fully the relevant history that was assumed to be accurate and was not disputed solely for purposes of summary judgment. *See* Pet. App. at 41a-46a.

[6] The 1834 Nonintercourse Act is presently codified at 25 U.S.C. § 177 (1982). This Court recently held in County of Oneida v. Oneida Indian Nation (*"Oneida II"*), —— U.S. ——, 53 U.S.L.W. 4225, 4229 (March 4, 1985) that the Nonintercourse Act merely codified existing common law restraints on alienation of Indian land.

[7] *See* below at 9-11.

Indians shall not be available to the Catawbas.[8] The Catawbas nevertheless maintain that they may challenge the validity of the 1840 transaction because they contend that state laws barring such stale claims do not apply to them and that they have special federal status and privileges.

The district court held that the Catawba termination act had profoundly changed the Catawbas' status under federal law, and, as a result, that their claim is now barred for several independent and alternative reasons.[9] Because the termination act plainly provides that state law shall apply to the Catawbas, and because the termination act ended any trust relationship between the Catawbas and the federal government that might preempt the application of state law to them, the district court concluded that the act made state law applicable to the Catawbas on its effective date, July 1, 1962. Pet. App. at 48a. As a consequence, the district court ruled that the ten-year South Carolina statute of limitations began to run once the termination act became effective and that it had expired before the Catawbas brought this action in 1980. Pet. App. at 49a.

Based on the revocation of the Catawbas' tribal constitution and legislative history confirming that after termination Congress did not intend to treat the Catawbas as a tribe under federal law, the district court alternatively held that the termination act ended any legal status the Catawbas may have had as a tribe or governmental entity. For this additional reason, the district court concluded that the Catawbas could not prevail. Pet. App. at 51a.

---

[8] *See* Section 5 of the Catawba termination act, 25 U.S.C. § 935, quoted in relevant part above at 2.

[9] Accordingly, the district court held that it was not necessary to resolve the many disputed historical facts raised by the respondent's claim to determine the Catawbas' *current* legal status. *See* the description of the proceedings below, Pet. App. at 4-7, and the district court opinion, Pet. App. at 35a-53a.

In a decision described by the Solicitor General as "clearly wrong," [10] a four-judge majority of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed. The *en banc* majority adopted the panel's majority ruling that the Catawba termination act "neither prohibits nor authorizes the application of state law to bar the Tribe's reservation claim," and that the act "did not end the trust relationship between the Tribe and the federal government." Pet. App. at 18a-19a, 23a. As a result, the majority refused to apply the state statute of limitations. The majority further ruled, largely because the State of South Carolina still holds land for the Catawbas, that the Catawbas must be treated as a tribe for purposes of federal law. Pet. App. at 18a. Three judges of the court of appeals dissented, declaring that the majority had "nullif[ied] the clear mandate of the Catawba Act." Pet. App. at 28a.

SUMMARY OF ARGUMENT

Pursuant to a clearly expressed policy of determining which Indians were prepared for independence from paternalistic federal programs and ending any special status under federal law they may previously have held, and with the manifest intent of making the Catawbas the same as other citizens of South Carolina, in 1959 Congress enacted a statute terminating any special Indian relationship between the United States and the Catawbas and explicitly directing that state law apply to the Catawbas in the same manner as to other persons and citizens. The language of the statute is clear. Moreover, legislative history and contemporaneous and current administrative interpretation confirm that Congress intended to terminate all aspects of any trust relationship

[10] Brief For the United States As Amicus Curiae (in support of petition for certiorari) ("U.S. Brief") at 16. Indeed, the Solicitor General urged the Court to review the majority decision below in part because of the degree of error committed by the majority. U.S. Brief at 18-19.

between the Catawbas and the United States and all vestiges of federal restraints on them based on their status as Indians.

As a consequence of Congress's decision to make state law applicable to the Catawbas and to terminate any special federal status, the Catawbas and any asserted property rights they held became subject to state law. A ten-year statute of limitations began to run on their claim once the termination act became effective and it expired long before they filed this action. This claim is now barred.

In addition, although the act did not preclude the Catawbas from voluntarily associating as an organization under state law, it eliminated any status they may have held as a "tribe" under federal law for purposes of the application of federal statutes such as the Nonintercourse Act. Because a present, historical and continuous tribal status under federal law is an essential element of this claim, the respondent cannot, as a matter of law, prevail.

ARGUMENT

I. The Catawba Termination Act Profoundly Changed The Catawbas' Legal Status By Terminating Any Special Status Under Federal Law And Explicitly Directing That State Law Shall Apply To The Catawbas.

A. *The Catawba Termination Act Was One Of A Dozen Termination Acts Passed Pursuant To A Declared Policy Of Completely Ending The Special Status Of Indians Under Federal Law.*

Pursuant to the Constitution's commitment to the federal government of paramount authority over Indian affairs,[11] the United States has plenary power to alter

[11] U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . with the Indian Tribes"). *E.g.*, Nat'l Farmers Union Ins. Co. v. Crow Indian Tribe, —— U.S. ——, 105 S.Ct. 2447 (1985).

the status of Indians and Indian tribes under federal law and to end completely any supervisory or trust responsibility for them.[12] As this Court declared in *United States* v. *Waller*:

> Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection.[13]

The need for supervision and protection has not always persisted. Accordingly, Congress has exercised its plenary power by making state law partially or wholly applicable to Indians and Indian tribes,[14] granting leases and rights of way across Indian lands,[15] dissolving Indian reservations,[16] disposing of Indian property (even without the

---

[12] *See, e.g.*, United States v. Nice, 241 U.S. 591, 598 (1916); Marchie Tiger v. West. Inv. Co., 221 U.S. 286 (1911).

[13] United States v. Waller, 243 U.S. 452, 459-60 (1917). *See also* Affiliated Ute Citizens v. United States (*"Affiliated Ute"*), 406 U.S. 128, 149-50 (1972) (terminated Indians required to challenge allegedly fraudulent transfers of their property under the same laws as non-Indians).

[14] *See, e.g.*, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) (congressional authorization of state jurisdiction permitted assumption of partial state jurisdiction over Indian reservations even without Indian consent); Dickson v. Luck Land Co., 242 U.S. 371, 375 (1917) (Congress intended state law regarding property transfers to apply to Indian land under act directing that Indians "shall have the benefit of and be subject to the laws, both civil and criminal, of the State"); United States v. City of McAlester, 604 F.2d 42, 52 (10th Cir. 1979) (*en banc*) (Curtis Act of 1898 held to allow Indian land to be taken in condemnation proceeding pursuant to state law).

[15] Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Cherokee Nation v. Southern Kans. Ry. Co., 135 U.S. 641 (1890).

consent of the Indians),[17] and terminating tribal status under federal law.[18]

During the early 1950's Congress adopted a policy of ending the special status of Indians under federal law, because that special status unacceptably segregated Indians from equal participation in the broader society.[19] The policy of ending the special status of Indians under federal law and permitting their participation in the mainstream of society on an equal basis with other citizens, became known as "termination," the acts implementing the policy as "termination acts," and the years from the early fifties through the late sixties as the "termination period."[20]

---

[16] DeCoteau v. District County Court, 420 U.S. 425 (1975).

[17] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See generally* Shoshone Tribe v. United States, 299 U.S. 476 (1937). The Court recently noted in Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2587, 2595 n.22 (1985), for instance, that Congress had authorized the condemnation of Pueblo lands where Pueblos had refused to make voluntary conveyances of easements to utilities and common carriers.

[18] Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); United States v. Wheeler, 435 U.S. 313, 323 (1978).

[19] In 1952 the House Interior and Insular Affairs Committee declared that perpetuation of any special status for Indians was undesirable:

> It is the belief of the committee that all legislation dealing with Indian affairs should be directed to the ending of a segregated race set aside from other citizens. It is the recommended policy of this committee that the Indians be assimilated into the Nation's social and economic life. The objectives, in bringing about the ending of the Indian segregation to which this committee has worked and recommends are: (1) the end of wardship or trust status as not acceptable to our American way of life, and (2) the assumption by individual Indians of all the duties, obligations, and privileges of free citizens. The committee realizes that these objectives cannot be accomplished "overnight," but recommends a constant effort in that direction,

The central purpose of termination legislation was to make state law, not federal law, apply to Indians and to end completely any special status held by Indians under federal law. One commentator succinctly described termination in a report to Congress:

> Termination, the official Federal Indian Policy from 1953 through the late 1960's may be defined simply as the cessation of the Federal-Indian relationship, whether that relationship was established through treaty or otherwise. *The thrust was to eliminate the reservations and to turn Indian affairs over to the states. Indians would become subject to state control* without any Federal support or restrictions. Indian land would no longer be held in trust and would be fully taxable and alienable, just like non-Indian land in the states.[21]

---

with careful and earnest consideration always given to the rights of the Indians.

H.R. Rep. No. 2503, 82d Cong., 2d Sess. 124 (1952) (R. Vol. III, Ex. 4) (J.A. 67).

On August 1, 1953 Congress passed House Concurrent Resolution 108. That resolution declared Congress's intent to make Indians subject to the same laws as other persons and to end any special status they might have had under federal law:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship. . . .

H.R. Con. Res. 108, 67 Stat. B132 (1953) (R. Vol. III, Ex. 3) (J.A. 53).

[20] *E.g.*, Wilkinson, The Passage of the Termination Legislation, *in* Final Report To The American Indian Policy Review Comm'n, *in* Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians*, 1627-49 (October 1976) (U.S. Gov't Printing Office).

[21] *Id.* at 1627 (footnote omitted) (emphasis supplied).

Senator Watkins, Chairman of the Senate Subcommittee on Indan Affairs, described the purpose of termination legislation:

> We do not want the Government still in the [Indian] business by any implication whatsoever. If we have severed the cord which binds us to the Indians or the Indians to us, we want it completely severed, and not just a little strand left.[22]

Pursuant to this policy and as a result of studies begun as early as 1953,[23] a dozen termination acts affecting approximately 100 tribes, bands and rancherias were passed between 1954 and 1962.[24]

---

[22] *Joint Hearings on S. 2745 and H.R. 7320 Before the House and Senate Subcommittee of the Committees on Interior and Insular Affairs*, 83d Cong., 2d Sess. 250 (1954) (R. Vol. III, Ex. 7). Seven years later when Menominee Indians attempted to forestall the termination of the trust relationship, other members of Congress were similarly unequivocal in stating their understanding of termination. Senator Anderson remarked, "Termination is a single term . . . . I am sure termination means termination and not continuance." Senator Church added, "An end is an end is an end." *Hearings on S. 869 and S. 870 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 18 (1961) (R. Vol. III, Ex. 9).

[23] In the spring of 1953, the House of Representatives directed the Committee on Interior and Insular Affairs to study the Bureau of Indian Affairs' ("BIA's") performance with respect to termination and to report a list of the Indian groups ready for immediate termination of federal supervision and responsibility. H.R. Res. 89, 83d Cong., 1st Sess. (1953) (R. Vol. III, Ex. 5) (J.A. 73-74).

[24] Enacted termination statutes are listed in alphabetical order by the name of the terminated Indian group:

Alabama-Coushatta, 25 U.S.C. §§ 721-728, 68 Stat. 769 (1954); California Rancheria, 72 Stat. 619 (1958); Catawba, 25 U.S.C. §§ 931-938, 73 Stat. 592 (1959); Klamath, 25 U.S.C. §§ 564-564x, 68 Stat. 718 (1954); Menominee, 25 U.S.C. §§ 891-902, 68 Stat. 250 (1954); Mixed-Blood Ute, 25 U.S.C. §§ 677-677aa, 68 Stat. 878 (1954); Ottawa, 25 U.S.C. §§ 841-853, 70 Stat. 963 (1956); Peoria, 25 U.S.C. §§ 821-826, 70 Stat. 937 (1956); Ponca, 25 U.S.C. §§ 971-980, 76 Stat. 429 (1962); Southern Paiute, 25 U.S.C. §§ 741-760,

B. *The Catawba Act Was Viewed By Congress, The Catawbas, And The BIA As Completely Terminating Any Special Status Under Federal Law.*

In September 1954, after a Bureau of Indian Affairs ("BIA") study, a special House Study Subcommittee on Indian Affairs reported that the Catawbas were among the Indian groups able to manage their own affairs and ready for termination.[25] The Subcommittee further recommended that steps be taken to discontinue BIA operations in South Carolina.[26]

Throughout the mid-fifties the Catawbas remained among the groups the BIA considered ready for termination.[27] In a June 21, 1957 letter responding to an inquiry about federal responsibility for the Catawbas, Acting Commissioner of Indian Affairs H. Rex Lee wrote that:

> We have surveyed the general situation at Catawba on a number of occasions over the past two years,

---

68 Stat. 1099 (1954); Western Oregon, 25 U.S.C. §§ 691-708, 68 Stat. 724 (1954); Wyandotte, 25 U.S.C. §§ 791-807, 70 Stat. 893 (1956). Hereinafter only citations to the United States Code will be used.

[25] H.R. Rep. No. 2680, 83d Cong., 2d Sess. 2-3 (1954) (R. Vol. III, Ex. 6) (J.A. 82-3). The Department of the Interior reported in 1959 that the Catawbas "have advanced economically at a steady pace during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors in the community." H.R. Rep. No. 910, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2674 (R. Vol. III, Ex. 25) (J.A. 124-25). At the time of the Catawba termination act, there were 162 Catawba families but there were 120 non-Indian spouses in those families. Approximately 79 of those families lived in Rock Hill and other non-Indian communities. R. Vol. III, Ex. 26 (J.A. 131).

[26] H.R. Rep. No. 2680, 83d Cong., 2d Sess. 4 (1954) (R. Vol. III, Ex. 6) (J.A. 86).

[27] BIA "Revised Summary Statement of Withdrawal as of December 31, 1955" (R. Vol. III, Ex. 11). Letter to South Carolina Congressman J.P. Richards from the Commissioner of Indian Affairs Glenn Emmons (June 13, 1956) (R. Vol. III, Ex. 12).

> and have come to the conclusion that their degree of adjustment and attainment in the community is such that we should work out plans with them for an early relinquishment of *all* restrictions over their property and affairs; *thus terminating any special relationship of the Catawbas to the Federal Government under trusteeship.*[28]

The Catawbas, the State of South Carolina and the BIA began preparing for termination.[29]

These activities resulted in a January 3, 1959 resolution by the Catawbas requesting South Carolina Congressman Robert Hemphill to secure the passage of legislation which would end their communal ownership of land and distribute to them as individuals 3400 acres, remove severe restraints on alienation of their land, and permit the Catawbas to obtain the credit necessary to build homes and improve their property.[30] The adoption of that resolution began the process of giving the Catawbas the same status as other citizens of South Carolina.

---

[28] R. Vol. III, Ex. 13 (emphasis supplied).

[29] In 1958 the State of South Carolina established a legislative commission to study the Catawbas' situation with a view to the enactment of termination legislation. At the request of South Carolina Congressman Robert Hemphill, a BIA Program Officer investigated whether the Catawbas were ready and willing to be terminated. Both the Program Officer and the state legislative commission met with tribal trustees and other Catawbas to discuss the proposal. Letter from Commissioner of Indian Affairs Glenn Emmons, to Congressman Hemphill (June 13, 1958) (R. Vol. III, Ex. 14). Letter from H. Rex Lee, Acting Commissioner of Indian Affairs, to Congressman Hemphill (August 22, 1958) (R. Vol. III, Ex. 15). Memorandum from Program Officer Bitney to BIA Chief, Branch of Tribal Programs (October 31, 1958) (R. Vol. III, Ex. 16).

[30] Resolution of Catawba Tribe of Indians (January 3, 1959) (R. Vol. III, Ex. 17) (J.A. 102-03). Letter to the Commissioner of Indian Affairs from Superintendent Butts of the Cherokee agency responsible for the Catawbas during the period of the Memorandum of Understanding (January 26, 1956) (R. Vol. III, Ex. 18) (J.A. 104-05).

Congressman Hemphill promptly had a bill drafted and met with the Catawbas on March 28, 1959 to explain it. According to the BIA Chief of Tribal Programs, who also attended the meeting, one of the purposes of the proposed legislation was "to terminate Federal responsibility to the tribe and its individual members." [31] Several Catawbas asked at the meeting whether the proposed legislation could be drafted to allow some Catawbas "to withdraw from Federal Supervision" and others to elect "to remain under Federal supervision." They mentioned the Klamath termination act [32] as an example of such partial termination. Congressman Hemphill responded that unless there was a "clear majority" for the bill as then drafted, providing for complete termination, he would not press for its enactment.[33] At the conclusion of that meeting a secret ballot was held, and the Catawbas again voted for termination.[34]

Congressman Hemphill then introduced H.R. 6128,[35] and the House Subcommittee on Indian Affairs held hearings on July 10, July 27, August 7 and August 12, 1959. Congressman Hemphill stated:

> They need it [the legislation] to put them on the *same status as other citizens* with the same responsibilities.[36]

---

[31] Memorandum from Homer B. Jenkins to H. Rex Lee, Associate Commissioner of Indian Affairs (March 31, 1959) (R. Vol. III, Ex. 20).

[32] 25 U.S.C. §§ 564-564x.

[33] Minutes of the Special Meeting of the Catawba Council held at the Catawba Indian School on Saturday, March 28, 1959 (minutes taken by a BIA assistant accompanying BIA Superintendent Butts) (R. Vol. III, Ex. 19) (J.A. 110-15).

[34] *Id.*

[35] 105 Cong. Rec. 5466 (1959) (R. Vol. III, Ex. 21). *See* H.R. 6128, 86th Cong., 1st Sess. (1959).

[36] The bill, H.R. 6128, was the subject of two days of public hearings before the Subcommittee on Indian Affairs of the House Committee on the Interior and Insular Affairs (July 10, 1959 and July 27, 1959), one meeting in the Executive Session of that Subcommittee (August 7, 1959), and one meeting in the full Committee (August 12, 1959). Transcripts of these hearings and congressional committee meetings are available for review (but not copying) through the House Committee on Interior and Insular Affairs. Verbatim excerpts were quoted in the briefs filed in the courts below. Such excerpts are cited here by the date of the transcript and the page where they appear. July 10, 1959, Hearing Transcript ("H.Tr.") at 10 (emphasis supplied).

Other Congressmen similarly stressed throughout the proceedings that the Catawbas would hold the same status as other persons after the legislation became effective. Subcommittee Chairman Haley remarked, for instance:

> Of course, if this bill is passed, in so far as the Federal Government is concerned the Indian will just be a citizen and he will receive no additional public service . . . .[37]

Committee Chairman Aspinall rejected the idea that any special federal status could linger:

> I am not so sure that we are doing anything for the Indian Tribe at all if, in one movement, we take away Federal control, Federal jurisdiction, and then in another at the same time we go ahead and give them special privileges.[38]

The Department of the Interior and its Bureau of Indian Affairs expressed their support of H.R. 6128, describing it as:

> a bill that will permit members of the Catawba Indian Tribe of South Carolina to divide their tribal assets and discontinue their special Indian relations with the Federal Government.[39]

---

[37] July 27, 1959, H.Tr. at 89.

[38] July 10, 1959, H.Tr. at 20.

[39] Department of the Interior, BIA Press Release (June 10, 1959) (R. Vol. III, Ex. 23) (J.A. 118). *See also* R. Vol. III, Exs. 28, 30.

Assistant Secretary of the Interior Roger Ernst submitted a letter in support of H.R. 6128, and a similar letter in support of a nearly identical Senate bill, in which he stated:

> When the program is completed, the Catawba Indians will cease to be subject to the Federal Indian laws . . . .[40]

Thus, the supporters of the bill presented and explained it as a termination act *completely* ending any special federal status for the Catawbas, and Congress understood that it was passing a bill similar to the other termination acts it had been considering and passing since 1954.[41]

On September 21, 1959 the President signed the bill,[42] but it was not yet effective because the Catawba termination act required the adult Catawbas to reaffirm that they desired termination.[43] Prior to the referendum, the Department of the Interior sent the Catawbas a detailed explanation of the act, emphasizing its finality and sweeping application:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act

[40] *See* H.R. Rep. No. 910, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2673 (R. Vol. III, Ex. 25) (J.A. 123). S. Rep. No. 863, 86th Cong., 1st Sess. 3 (1959) (R. Vol. III, Ex. 26) (J.A. 130).

[41] *See, e.g.*, 105 Cong. Rec. 15583 (1959) (R. Vol. III, Ex. 24). (Extended remarks of Congressman Berry describing bill as a "termination of the Catawba Indian Reservation").

[42] 105 Cong. Rec. 19751, 19752 (1959) (R. Vol. III, Ex. 27). Pub. L. No. 86-322, 73 Stat. 592 (1959).

[43] 25 U.S.C. § 931.

> prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.[44]

After receiving this explanation, the Catawbas voted once again in favor of termination. On July 1, 1960, the Secretary of the Interior published notice in the Federal Register that the Catawbas had voted to accept the 1959 act.[45] On February 7, 1961, the Department of the Interior published a "final roll" listing the Catawbas.[46] On July 1, 1962, the Secretary took the final step of revoking the Catawbas' constitution, and the Catawbas were officially terminated.[47]

Congress thereafter treated the Catawbas as an Indian group completely terminated from any federal trust relationship.[48] When Congress directed a study of the termination acts, the Catawba Act was included.[49] Un-

[44] R. Vol. III, Ex. 29 (attachment sent to Catawbas) (J.A. 137). The plaintiff Catawba corporation is precisely the kind of nongovernmental organization Congress contemplated that the Catawbas might create. The Department's explanation of the termination act, however, makes it abundantly clear that such an organization would be subject to state law and would not qualify as a "tribe" within the special meaning of that term in federal law. *See* below at 47-50.

[45] 25 Fed. Reg. 6305 (1960) (R. Vol. III, Ex. 32). *Also* Memorandum from Commissioner of Indian Affairs Glenn Emmons to the Secretary of the Interior stamped received on June 30, 1960 (R. Vol. III, Ex. 31).

[46] 26 Fed. Reg. 1680 (1961) (R. Vol. III, Ex. 34).

[47] R. Vol. III, Exs. 35, 36 (J.A. 138, 140); R. Vol. III, Ex. 37.

[48] *Hearings on S. 3174 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 8 (1962) (R. Vol. III, Ex. 10). (Senator Mangam describing the Catawba legislation as a "termination of the federal trust over the affairs" of the Catawbas) (R. Vol. III, Ex. 10).

[49] Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians*, 1650 (Oct. 1976) (U.S. Gov't Printing Office).

like the Menominee Indians and a few other terminated groups, the Catawbas have never been "restored." [50] The Bureau of Indian Affairs includes them on its updated list of terminated Indian tribes.[51]

Thus, the Catawba termination act was referred to by those who enacted it,[52] those who administered it,[53] and by the Catawbas themselves [54] as a termination act. In-

---

[50] *E.g.*, 25 U.S.C. §§ 903-903f (1982) (repealing the Menominee termination act).

[51] BIA Branch of Tribal Relations: List of Indian Tribes Terminated from Federal Supervision (April 1, 1981), (R. Vol. III, Ex. 39) (J.A. 142).

[52] The act's sponsor, Congressman Hemphill told the Subcommittee that the bill was "the usual termination bill, with the usual provisions with which you are intimately familiar." July 10, 1959, H.Tr. at 12. *See also* remarks of Mr. Edmonson, July 10, 1959, H.Tr. at 20 (Catawba act similar to Wyandotte and Peoria termination acts); remarks of Subcommittee Chairman Haley, July 27, 1959, H.Tr. at 90 (calling the envisioned result of the bill "termination"); remarks of Mr. Edmonson, August 7, 1959, Executive Session transcript at 136 (noting that provisions for vocational training are "in conformity with similar language that has appeared in all of the termination bills adopted by Oklahoma Indian Tribes so far"); letter recommending an amendment proposed by the Association on American Indian Affairs, Inc., July 10, 1959, H.Tr., letter found as enclosure after 14, (describing the Catawba act as "a bill to terminate Federal relations with the [Catawbas]").

[53] Administrative officials consistently referred to the bill as termination legislation. *See* remarks of H. Rex Lee, Associate Commissioner of the BIA, July 27, 1959, H.Tr. at 85, 86 (referring to the proposal concerning the Catawbas as "termination"); remarks of Lewis A. Sigler, Legislative Counsel, Office of the Solicitor of DOI, August 12, 1959, full committee meeting transcript at 10, 15 (describing the referendum procedure under the Catawba act as a "termination process" and comparing the Catawba act to other termination acts).

[54] The Catawbas themselves referred to the proposal as "termination." *See* remarks of Catawba Samuel Beck, July 10, 1959, H.Tr. 46 ("I feel if termination is made then our tribe will be non-existent from here on out and we will not have a reservation."). *See also*

deed, in *Affiliated Ute* this Court itself identified the Catawba act as a termination act.[55]

C. *The Catawba Act Plainly Directs That State Law Shall Apply To The Catawbas.*

As this Court recently reiterated, "the starting point in every case involving construction of [a] statute is [the] language itself." [56] The language of the Catawba termination act compels the conclusion that state law applies to the Catawbas and any assertion of property rights by them. Section 5 of the Catawba termination act declares, without ambiguity or qualification, that upon its effective date:

> [T]he laws of the several States shall apply to them [the tribe and its members] in the same manner they apply to other persons or citizens within their jurisdiction.

The court of appeals minority accurately described this language as "plain and far-reaching." [57] The Solicitor General likewise has concluded that Section 5 "expressly provides that state laws shall apply to them," [58] stating, "The fact is the Catawba Act is not equivocal." [59]

Far from finding any ambiguity in the language contained in the Catawba termination act and similar acts that would cast doubt on the applicability of state law to terminated Indians, this Court has declared that a termi-

---

references to "termination," July 10, 1959, H.Tr. at 63 (by Beck), 64, 68, 78 (by Catawba Mrs. F.G. Davis).

[55] *See Affiliated Ute*, 406 U.S. 128, 133 n.1, listing the Catawba act as "one of a series of termination [acts]."

[56] *E.g.*, Landreth Timber Co. v. Landreth, —— U.S. ——, 105 S.Ct. 2297, 2298 (1985), *quoting* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

[57] Pet. App. at 25a.

[58] U.S. Brief at 9.

[59] U.S. Brief at 15.

nation act is an explicit congressional directive that state law shall broadly apply to Indians. Comparing the explicit language of the termination acts to more general legislation extending only certain types of state jurisdiction over Indians, the Court said in *Bryan* v. *Itasca County*:

> [*T*]*ermination Acts* [*are*] . . . *cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation.* [Citations omitted.] These termination enactments provide expressly for subjecting distributed property "and any income derived therefrom . . . to the same taxes, State and Federal, as in the case of non-Indians," [citations omitted] and provide that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction . . . ." [*T*]*his* [*is*] *express language respecting state taxation and application of the full range of state laws to tribal members* . . . .[60]

Similarly, in *United States* v. *Antelope*,[61] the Court declared that termination acts make state laws applicable to the affected Indians rather than federal laws such as the Major Crimes Act. *See also United States* v. *Heath*, cited with approval in *Antelope*, where the court of appeals stated:

> Pursuant to [the Klamath termination act], Klamath Indians are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state.[62]

---

[60] Bryan v. Itasca County, 426 U.S. 373, 389-90 (1976) (emphasis supplied).

[61] United States v. Antelope, 430 U.S. 641, 646-47 n.7 (1977).

[62] United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). The operative provision of the Klamath termination act, 25 U.S.C. § 564q (1982), contains language similar to that of the Catawba act. *Accord*, Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981) (holding that state law applied to property of terminated Indian).

The legislative history of the Catawba termination act confirms that Congress intended to make state law apply to the Catawbas and any property interests they held. Congressman Robert Hemphill, introduced the bill by explaining:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.[63]

Congressman Hempbill explained in hearings on the bill that after termination all of the Catawbas' activities would be governed by state law. For example, he specifically advised the Catawbas to form a non-profit, *state*-chartered corporation to conduct any group activities and to maintain an exemption from state taxes.[64] Similarly, Subcommittee Chairman Haley and Bureau of Indian Affairs Associate Commissioner H. Rex Lee each testified that after passage of the termination act that Catawbas could act collectively as a non-profit corporation subject to *state* law.[65] In fact, some Catawbas testified in opposition to the proposed legislation precisely because they understood that the termination act would subject them to state law, including various property and income taxes which they had not previously been required to pay.[66] One such Catawba, Samuel Beck, acknowledged:

> Of course, that is the idea of this bill, that we will be put on the same footing as the other citizens in the country . . . .[67]

---

[63] 105 Cong. Rec. 5162 (1959) (R. Vol. III, Ex. 22).

[64] July 10, 1959, H.Tr. at 30.

[65] July 10, 1959, H.Tr. at 53-4; July 27, 1959, H.Tr. at 90.

[66] July 10, 1959, H.Tr. at 53-63.

[67] July 10, 1959, H.Tr. at 45-6.

Other Catawbas spoke in support of the legislation, embracing both the responsibilities it would impose on them, such as the payment of state taxes, and the benefits it would provide.[68] Nowhere in the hearings, committee meetings, or congressional debate on the legislation, or in the meetings held with the Catawbas, did anyone suggest that the Catawbas would be immune from any state law after the termination legislation became effective.

Furthermore, the Department of the Interior contemporaneously interpreted the Catawba termination act as subjecting the Catawbas to state law. Pursuant to the terms of the act, a plebiscite was held in which all adult Catawbas voted to approve or disapprove implementation of the act. In preparation for this referendum, the Department of the Interior sent the Catawbas a detailed explanation of the act. The explanation noted that the Indians might organize as a non-profit organization to conduct community activities, subject to *state* law.[69] Later, when the Secretary of the Department of the Interior officially revoked the Catawbas' tribal constitution, the Secretary wrote to Catawba Chief Albert E. Sanders, Sr. that "the laws of the several States shall apply," in accord with Section 5 of the Catawba termination act.[70] This contemporaneous interpretation of a statute by those responsible for administering it "is entitled to very great respect." [71]

---

[68] July 27, 1959, H.Tr. at 97-109. A State Representative who attended a meeting of the Catawbas to discuss the legislation had specifically cautioned them that *state* law would apply and would require any Catawbas on welfare who held title to property to give the State of South Carolina a lien on that property. Minutes of the Special Meeting of the Catawba Council held at the Catawba Indian School on Saturday, March 28, 1959 (minutes taken by a BIA assistant accompanying BIA Supt. Butts) (R. Vol. III, Ex. 19) (J.A. 110-15).

[69] R. Vol. III, Ex. 29 (J.A. 137).

[70] R. Vol. III, Ex. 35 (J.A. 139).

[71] Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2587, 2597 (1985), *quoting* Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

Thus, the Catawba termination act expressly directs that state law apply to the Catawbas, and this Court has declared that same language to subject Indians to state, instead of federal, law. Legislative history and contemporaneous administrative interpretation further confirm that Congress intended to change the Catawbas' legal status so that they would hold no special immunities, privileges, rights or restrictions because of their Indian heritage.

D. *Because Congress Ended Any Special Federal Status Of The Catawbas, State Law, Including State Statutes Of Limitations, Necessarily Began To Apply To The Catawbas.*

Even if Section 5 of the Catawba act had not explicitly directed that state law apply to the Catawbas, the termination of any special status under federal law made state law applicable to the Catawbas and to the enforcement of any alleged property interests. It is only Indians' special status under federal law that precludes the operation of state law with respect to them.[72] By terminating any special federal status held by the Catawbas, Congress eliminated the sole impediment to the application of state law to them. As a result, state law, including statutes of limitations, applied to the Catawbas.[73]

---

[72] *Oneida II*, 53 U.S.L.W. at 4229 (March 4, 1985).

[73] *See* Schrimpscher v. Stockton, 183 U.S. 290 (1902); Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984); Dillon v. Antler Land Co., 341 F. Supp. 734, 741-42 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 431 U.S. 992 (1975). *See* above at 8-9 and nn.11-13, and below at 32 and nn.93-94. Because the statute of limitations already barred this action, it was unnecessary to analyze whether related equitable doctrines of repose such as laches also barred the action. *Compare* Felix v. Patrick, 145 U.S. 317, (1892) (applying doctrine of laches). The application of such doctrines was not briefed or decided in the court below.

The Court's decision in *Schrimpscher* v. *Stockton*[74] demonstrates that the court of appeals majority should be reversed. In *Schrimpscher*, the Indian heirs of a Wyandotte Indian sued to recover lands their predecessor had conveyed to non-Indians. Although the conveyance occurred when alienation of the land was prohibited by a federal treaty, a later treaty terminated all such restrictions. The Court held that the Indians' claim was barred by state statutes of limitations, which had begun to run once the restrictions were lifted and the Indians held the same rights as other persons:

> Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered [sic] title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute, (whether the limitation be three or fifteen years), since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.[75]

The Court rejected the *Schrimpscher* plaintiffs' argument that state statutes of limitations do not run against Indians. Instead, the Court ruled that state law applied, relying upon language in a treaty which, like Section 5 of the Catawba termination act, provided that the Wyandotte Indians "shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said Territory."[76]

---

[74] *Schrimpscher*, 183 U.S. 290 (1901).

[75] *Id.* at 296.

[76] *Id.* at 297. *See also* Dickson v. Luck Land Co., 242 U.S. 371 (1917).

The Court's analysis in *Schrimpscher* continues to be applied by the lower courts. In *Dillon* v. *Antler Land Co.*,[77] Indian land was allegedly transferred in violation of a federal restriction on alienation. After the transfer, Congress removed the restriction and directed that state law apply. The court held that the state statute of limitations began to run at the time state law was made applicable and barred the claim. Similarly, relying on *Schrimpscher*, the court in *Dennison* v. *Topeka Chambers Industrial Development Corp.*[78] held that the state statute of limitations barred a claim that Indian property had been conveyed in violation of federal restrictions against alienation. The court declared that the statute of limitations began to run once restrictions were removed and state law became applicable.

Courts which have declared that Indian land claims are not barred by state law defenses, have done so because the Indians involved still held a special status under federal law.[79] No court has held that state law is inapplica-

---

[77] Dillon v. Antler Land Co., 341 F. Supp. 734, 741-42 (D. Mont. 1972), *aff'd*, 507 F.2d 940, 942-43 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

[78] Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984).

[79] *See, e.g., Oneida II*, —— U.S. ——, 53 U.S.L.W. 4225, 4229 (March 4, 1985) (state statute of limitations did not apply to Indian land claim because Congress had specifically provided that state law would not apply to pre-1952 claims in enacting a statute that otherwise gave state courts civil jurisdiction over Indians), *citing* Ewert v. Bluejacket, 259 U.S. 129, 137 (1922). *See also* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) (no evidence that Congress had ever *terminated* the federal trust relationship); United States v. Schwarz, 460 F.2d 1365, 1371-1372 (7th Cir. 1972) (state law defenses not applicable so long as restrictions on alienation of Indian land exist); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 420-23 (4th Cir. 1938) (state law did not apply to Eastern Band of Cherokee Indians precisely because those Indians were under the guardianship of the federal government, *citing Schrimpscher*); Narragansett Tribe v. Southern

ble to an Indian land claim where a termination act has become effective or where the federal government has otherwise acted to completely end any special federal status.

II. State Law Now Bars This Action.

South Carolina law requires any citizen or person, including the respondent state-chartered corporation, to bring an action for recovery of real property within ten years.

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.[80]

As the Supreme Court of South Carolina has affirmed:

> [A defendant in a claim to recover land] may defeat the plaintiff's title by showing that *the plaintiff himself has not been in possession for 10 years next before the beginning of th*[*e*] *action*; . . . the law

---

Land Dev. Corp., 418 F. Supp. 798, 803-05 (D.R.I. 1976) (no federal statute subjected the Indians to state law and they had never been termin[illegible]ed); Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780, 784 85 (D. Conn. 1976) (same).

Whether the South Carolina statute of limitations became directly applicable (*Schrimpscher*, 183 U.S. 290 (1901)) or was borrowed and applied to the Catawbas' claim (*Oneida II*, —— U.S. ——, 53 U.S.L.W. 4225, 4229 (March 4, 1985)) the result is the same. Once Congress terminated its federal relationship with the Catawbas and made state law applicable to them and all their rights, privileges and obligations, no federal policy precluded the application of the state statute of limitations to this claim.

[80] S.C. Code Ann. § 15-3-340 (Law. Coop. 1976). Seisin was a form of possession under the common law. Even if a person were not himself physically in possession of land, he could be "seized" if his tenants were in physical possession. *See, e.g.*, Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727, 729 (1923).

> makes possession a very strong factor in the question of title to real estate, and it says that if a man stays out of possession for 10 years, asserts no claim to a piece of property, does not occupy it by himself or tenants, and lets that situation remain for 10 years, the law says that it is too late for him to come in, that he is barred by the statute of limitations, and having slept on his rights for as long as 10 years, he cannot come in afterwards and assert his rights.[81]

Because the Catawba termination act became effective on July 1, 1962, making state law applicable to the Catawbas, the South Carolina statute began running on that date. By their own admission, the Catawbas exercised no powers of ownership over the land in issue for approximately 140 years before suit was commenced.[82] They admittedly did not possess the land in issue at any time during the ten years before they commenced this action. Accordingly, this action is now barred.[83]

---

[81] *Id.*

[82] Complaint ¶ 19 (R. Vol. I, N.R. 1) (J.A. 23).

[83] In opposition to the petition for certiorari, and in both the district court and the court of appeals, the respondent attempted to save a portion of its claim by arguing that the state statute of limitations only bars its claim against some, but not all, of the current landowners. Respondent Tribe's Supplemental Brief (on petition for a writ of certiorari) 1-5. Because some of the current landowners may not have possessed their property continuously for the ten years necessary under South Carolina law to acquire title by adverse possession, the respondent mistakenly contends that it can maintain, against those defendants, a claim that accrued in 1840.

The respondent's argument, however, confuses the statute of limitations with the doctrine of adverse possession. The statute of limitations defeats a plaintiff's claim by barring the plaintiff's right to maintain an action. In South Carolina the statute of limitations operates to bar a plaintiff's claim upon a demonstration that the *plaintiff* has not possessed the land at issue within ten years of the commencement of its action. If a plaintiff's claim is barred by the statute of limitations, a defendant has no further obligation to demonstrate that he has himself satisfied the requirements of adverse

A second South Carolina statute confirms that the Catawbas were obligated to bring their claim within ten years. By this statute, South Carolina requires a person who has been subject to a disability that tolled the running of the statute of limitations to bring any action to recover land within ten years after the date that the disability ends.

> If a person entitled to commence any action for the recovery of real property [is subject to a disability such as minority or insanity] . . . [t]he time during which such disability shall continue shall not be deemed any portion of the time . . . limited for the commencement of such action . . . . but such action may be commenced . . . within ten years after the disability shall cease . . . *But such action shall not be commenced . . . after that period.*[84]

---

possession. The respondent's admitted failure to act on its claim while being out of possession for more than ten years since the statute of limitations began to run now bars its claim.

Whether some or all of the current landowners could also defeat the respondent's claim by adverse possession is irrelevant. In fact, the South Carolina adverse possession statute is found under a different chapter of the code at § 15-67-210. That courts often address both the statute of limitations and the concept of adverse possession is explained by the fact that defendants often allege both in their effort to defeat a plaintiff's claim. *E.g., Haithcock,* 123 S.C. 61, 115 S.E. 727, 729-30 (1923). If the respondent is barred from asserting its allegedly superior title by the statute of limitations, the thousands of persons holding record title will be able to rely upon their record title without any need to resort to adverse possession.

The district court correctly rejected the respondent's argument concerning adverse possession. Pet. App. at 49a. The court of appeals never reached this issue since it determined that the state statute of limitations did not apply.

[84] S.C. Code Ann. § 15-3-370 (Law. Coop. 1976 and Supp. 1984) (emphasis supplied). *See* MacCaw v. Crawley, 59 S.C. 342, 37 S.E. 934 (1901). *Accord,* Schrimpscher v. Stockton, 183 U.S. 290 (1901); Felix v. Patrick, 145 U.S. 317, 330-31 (1892).

The Catawbas contend that they were wards of the United States prior to enactment of the Catawba termination act and were therefore "disabled" from conveying their land without consent of the United States. When the Catawba termination act ended that "disability" in 1962 and made state law applicable to the Catawbas, they had ten years to bring their action.[85] Having failed to do so, they are now barred.

III. The Decision By The Court Of Appeals Majority That State Law Does Not Apply Defies The Plain Language Of The Statute.

The court of appeals majority reached a conclusion diametrically opposed to the plain words of the Catawba termination act. Notwithstanding the act's explicit declaration that "the tribe and its members shall *not* be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians," the majority ruled that the Catawbas *shall* be entitled to one of the special services the United States provides to Indians—service as their trustee or guardian.[86] Despite the act's explicit command that "*all* statutes that affect Indians because of their status as Indians shall not be applicable to them [the tribe and its members]," the majority held that at least one federal Indian statute, the Nonintercourse Act *shall* be applicable.[87] Finally, despite the statute's command that "the laws of the several states *shall apply* [to the tribe and its members] *in the same manner* they apply to the other

---

[85] *E.g., Schrimpscher,* 183 U.S. 290, 296. Because the defendant's motion below addressed only the effect of the Catawba termination act, the defendants assumed *arguendo* that the Catawbas possessed a sufficient special federal status and federal trust relationship until the effective date of that act to prevent state statutes of limitations from beginning to run against them.

[86] *Cf.* 25 U.S.C. § 935 *with* Pet. App. at 19a-22a.

[87] *Cf.* 25 U.S.C. § 935 *with* Pet. App. at 19a-22a.

persons or citizens within their jurisdiction," the majority held that the act did *not* make state law apply to the Catawbas in the same manner it applied to others.[88]

To reach this result, the majority misinterpreted Section 6 of the act, 25 U.S.C. § 936, as somehow precluding the application of state law, offered a grammatical construction of Section 5 which is in fact impossible, and relied on canons of construction which have no application where, as here, congressional intent is clearly expressed and unambiguous.

A. *The Court Of Appeals Majority Mistakenly Concluded That Section 6 Of The Act Is Inconsistent With The Application Of State Law To This Action.*

The majority declared that Section 6 made it "incongruous" for the South Carolina statute of limitations to apply to any claim the Catawbas might have possessed.[89] Section 6 provides:

> Nothing in [this act] shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina.[90]

Nothing in Section 6 of the Catawba termination act, however, is incompatible with the application of the state statute of limitations to the Catawbas' claim. Section 6 makes it clear that the termination act changed only the Catawbas' special status under *federal* law and did not affect any rights or obligations they may have had under *state* law. Section 6 thus assured that the act would not be construed to interfere with state "rights, privileges or obligations." [91]

---

[88] *Cf.* 25 U.S.C. § 935 with Pet. App. at 22a-23e.

[89] Pet. App. at 23a.

[90] 25 U.S.C. § 936. *See* Pet. App. at 58a.

[91] Consistent with Section 6, Section 3 left to the State of South Carolina the decision whether the reservation held in trust by the state would be divided and distributed pursuant to the termination act or would continue to be held by the state.

If any construction of the act is "incongruous," it is the one offered by the majority. As interpreted by the majority, Section 6 would render meaningless the explicit and unqualified directive in Section 5 that state law shall apply to the Catawbas. The majority's interpretation thus not only cannot be supported by the language of Sections 5 and 6, but also violates "the elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative." [92] Furthermore, the majority's construction even renders portions of Section 6 meaningless. That section expressly subjects the Catawbas to the "obligations" of South Carolina law, and one of the obligations that South Carolina imposes on its citizens is that they assert any claim within the time period provided by law.

The majority apparently reasoned that if the state statute of limitations was not applicable to the Catawbas' claim prior to the termination act, the provisions of Section 6 preserving the Catawbas' rights and obligations under state law continued to preclude the running of the statute of limitations.[93] The majority failed to recognize that it was only *federal* law, not *state* law, that previously prevented the running of the state statute of limitations on the Catawbas' claim. Once Congress determined that state law should apply to the Catawbas and that the Catawbas' relationship with the United States should be terminated, federal law no longer prevented application of the state statute of limitations.[94]

---

[92] *See* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2587, 2595 (1985), *quoting* Colautti v. Franklin, 439 U.S. 379, 392 (1979); Gen. Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 778 (5th Cir. 1968).

[93] Pet. App. at 22a-23a.

[94] The Solicitor General explained that it is special protection under federal law which "uniquely immunizes the title of Indian tribes

B. *The Decision Of The Court Of Appeals Majority Is Based Upon A Grammatically Impossible Construction Of The Act.*

In an apparent effort to diminish the effect of the Catawba termination act, the court of appeals majority concluded that Section 5 made state law applicable to individual Catawbas but not to Catawbas acting collectively. Focusing upon individual clauses of the critical sentence in Section 5, the majority concluded that references to "them," and to "Indians" were references only to individual Indians and not to the tribe.[95] This construction, however, is grammatically impossible,[96] and, as the Solicitor General stated, is "clearly wrong." [97]

The second sentence of Section 5 of the Catawba termination act is a compound sentence composed of three independent principal clauses. The "tribe and its members" are the subject of the sentence, and its provisions set forth what happens to "them," the subject of the sentence. In simplified form, the sentence reads:

> [T]he tribe and its members shall not be entitled to any of the special services . . . [provided] for Indians because of their status as Indians, all [federal] statutes . . . that affect Indians because of their status as Indians shall be inapplicable to them; and [state law] shall apply to them. . . .

The antecedent of the term "them" is the "tribe and its members," and not, as the majority concluded, the word "Indians." Instead, the word "Indians" appears in adjectival phrases to describe which services and which

---

from state-law rules." U.S. Brief at 10-11. Once federal protection has been removed, either by explicit statutory language making state law apply or by the termination of any special federal status or trust relationship, then state law automatically begins to apply.

[95] Pet. App. at 20a-21a.

[96] *See also* Reply to Brief in Opposition to the Petition at 3-5.

[97] U.S. Brief at 11-12.

statutes shall be inapplicable to the "tribe and its members."

As the Solicitor General explained, the majority's reasoning "is flawed even if the court were correct in focusing on the word 'Indians'." [98] The initial clause of the same sentence provides that " 'the tribe and its members shall not be entitled to any services performed by the United States for *Indians* because of their status as *Indians*'." [99] That clause clearly contemplates that the word "Indians" applies to both the tribe and its members.

The majority attempted to bolster their construction by asserting that the 1834 Nonintercourse Act used the term "Indians" only to refer to individual Indians and not Indian tribes. They then concluded that the Congress that passed the 1959 Catawba termination act must have known of and employed the same purported distinction.[100] But there is no such distinction in the Nonintercourse Act, which uses the term "Indians" interchangeably with the terms "Indian nation" and "tribe of Indians." [101]

---

[98] U.S. Brief at 12, n.11.

[99] *Id.* (emphasis supplied).

[100] Pet. App. at 20a-21a.

[101] The first sentence of this statute requires that a land transfer by an "Indian nation or tribe of Indians" be conducted pursuant to treaty. The second sentence imposes a fine on any person who negotiates a transfer from an Indian nation or tribe without federal authority. The third sentence, however, permits a representative of a state, accompanied by a federal commissioner, to negotiate a transfer of land by a treaty "with Indians" and to compensate "the Indians." The third sentence modifies the provisions of the first and second sentences for dealing with Indian tribes, describing the one circumstance in which a state may treat with a tribe. It merely substitutes the term "Indians" for "tribes." Indeed, the third sentence only makes sense if the term "Indians" means "Indian tribes," since the federal government did not negotiate treaties with individual Indians, and since Indians commonly held land collectively as a tribe, not as individuals.

Moreover, in *Wilson* v. *Omaha Indian Tribe* [102] this Court declared that "Indians" and "Indian tribes" mean the same thing in the Trade and Intercourse Act, of which the Nonintercourse Act is a part. Thus, neither English grammar nor the purported distinction in the language of the Nonintercourse Act permits the majority's construction of the Catawba termination act.

C. *The Court Of Appeals Majority Erroneously Resorted To Canons Of Construction That Have No Application To This Plain And Unambiguous Statute.*

Ignoring the statute's clear and explicit directive that state law shall apply to the Catawbas, and its termination of all aspects of special status under federal law, the majority announced a canon of construction that statutes affecting Indians "should not be construed to the Indians' prejudice." [103] That is simply not the law. Congressional intent, as expressed in a statute, must be given effect by a court.[104] There is no canon of construction that permits a court to ignore congressional intent in order to favor a particular group of litigants.[105] As this

---

[102] Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664-66 (1979) (subsequent history omitted). *See also* Mohegan Tribe v. Connecticut, 638 F.2d 612, 627 n.18 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

[103] Pet. App. at 13a. Presumably the majority used the word "Indians" here to include Indian tribes, as well as individual Indians, contradicting their construction of the word "Indians" in the Catawba act as limited to individual Indians.

[104] *E.g.*, United States v. First National Bank, 234 U.S. 245 (1914); Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) ("The court's first duty in construing the statute is to effectuate the express intent of Congress.").

[105] A court's role is to construe the law, not to rewrite it. *See, e.g.*, United States v. Hoodie, 588 F.2d 292, 295 (9th Cir. 1978), *vacating* 441 F. Supp. 835 (D. Or. 1977):

> [I]t is apparent that the district court was guided largely by its perception that Congress has become increasingly solicitous

Court recently explained in rejecting the Klamath Indians' claim that they retained a right to hunt and fish on ceded lands free of state regulation, *Oregon Department of Fish and Wildlife* v. *Klamath Indian Tribe*:

> [E]ven though "legal ambiguities are resolved to the benefit of the Indians". . ., courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal" . . ., clearly runs counter to a Tribe's later claims.[106]

Special canons of construction favoring Indians *only* come into play if, after examination of the language of the statute to be construed, the legislative history, administrative interpretation and the full context, it is still uncertain what Congress intended.[107] As this Court said in *Rice* v. *Rehner*:

> [W]e have consistently refused to apply such a canon of construction [favoring Indians] when application would be tantamount to a formalistic disregard of congressional intent.[108]

In this case there is no uncertainty. The statute directs, and its legislative history confirms, that state law

---

of Indian rights and that its holding would favor such rights. In another context, however, the Supreme Court admonished:

> [A] statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." [Citations omitted.]

[106] Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, —— U.S. ——, 53 U.S.L.W. 5106, 5112 (July 2, 1985).

[107] *E.g.*, Lower Brule Sioux Tribe v. United States, 712 F.2d 349, 352 (8th Cir. 1983) ("[A]n examination of the legislative history and circumstances surrounding the enactment of a statute may reveal Congressional intent and resolve the ambiguity, obviating resort to these rules.").

[108] Rice v. Rehner, 463 U.S. 713, 732 (1983).

shall apply to the Catawbas and that the Catawbas shall not have any special status under federal law. No canon of construction authorized the court of appeals majority to ignore Congress's manifest intent.

IV. The Court Of Appeals Majority Erred In Ruling That Some Trust Relationship Or Special Federal Status Persisted After The Catawba Termination Act Became Effective.

Although the language and legislative history of the Catawba termination act clearly manifest Congress's intent that any trust relationship between the Catawbas and the United States be terminated, the majority nevertheless held that the Catawbas have a special status under federal law which precludes application of state statutes of limitations. The majority accomplished this revision of the statute Congress enacted by holding that the act (1) operated only to rescind a 1943 Memorandum of Understanding between the Department of the Interior, the State of South Carolina and the Catawbas and (2) preserved this claim from its effects in any event.

The court of appeals majority was not authorized, however, to rewrite the law and create a special status for the Catawbas. As another court of appeals declared in giving effect to the Affiliated Ute termination statute:

> It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.[109]

A. *The Majority Erroneously Concluded That The Catawba Termination Act Was Intended Only To Revoke The 1943 Memorandum Of Understanding.*

Although the court of appeals majority recognized that the purpose and effect of federal Indian policy in the

[109] Reyos v. United States, 431 F.2d 1337 (10th Cir. 1970), *aff'd in relevant part*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

1950's and early 1960's was to end the special status held by Indians under federal law,[110] it nevertheless concluded that the Catawba termination act "was intended only to end federal supervision and assistance arising out of the 1943 Memorandum of Understanding." [111] Nothing in the language of the Catawba termination act suggests so limited a purpose. The provisions of Section 5 are as broad and all encompassing as the provisions of other termination acts.[112] In fact, those provisions are the hallmark of termination legislation.[113] According to the Solicitor Gen-

[110] Pet. App. at 9a and n.5.

[111] Pet. App. at 15a-16a. Pursuant to that Memorandum of Understanding, South Carolina agreed to authorize the expenditure of up to $75,000 to purchase lands for the Catawbas, and the state subsequently purchased over 3,000 acres of land for the Catawbas. South Carolina also agreed to appropriate at least $9,500 annually in 1944, 1945 and 1946 to be expended by the Office of Indian Affairs, and to extend the rights and privileges of all citizens, including admission to schools, to the Catawbas. The Office of Indian Affairs agreed to further assist the Catawbas. (R. Vol. V-VI, Ex. 52) (J.A. 45).

According to an exhibit submitted by the Catawbas, (R. Vol. V-VI, Ex. 50) (J.A. 41-2) the Memorandum of Understanding was treated by the Department of the Interior as a contract under the Johnson-O'Malley Act, 25 U.S.C. §§ 452-454 (1982). Because termination of such a contract does not require congressional action, it is highly unlikely that Congress would enact legislation for the sole purpose of rescinding that contract.

[112] Every one of the other termination acts contains similar operative provisions specifying that the terminated Indians will not be entitled to special federal Indian services, that federal Indian statutes will not apply to them, and that state law will become applicable to them. If Congress had intended to distinguish between the Catawba act and other termination acts and to limit the effect of the Catawba act, one would have expected some indication of that intent to be expressed. None was.

[113] For example, Congressman Aspinall cautioned Congress to include those provisions in the California Rancheria Act, 72 Stat. 619 (1958), to make clear that the legislation was indeed a termination act. Hearings on H.R. 2576, H.R. 2824, H.R. 2838, H.R. 6364 before the Subcommittee on Indian Affairs, 85th Cong., 1st Sess. at 98 (1957) (R. Vol. III, Ex. 8).

eral, the provisions found in Section 5 manifest Congress's intention to terminate "*all* trust relationships between the federal government and the tribe concerned, whatever their source." [114] No provision of the act limits its effect to revocation of the 1943 Memorandum of Understanding. Indeed, the act does not make even a single reference to the 1943 Memorandum.

Sections 3 and 4 of the act, providing for the distribution of assets, and the first clause of Section 5, ending federal Indian services, were sufficient, without more, to end any federal relationship arising solely from the 1943 Memorandum. Section 5, however, provides for much more than mere revocation of the 1943 Memorandum by directing that *no* federal Indian statutes shall apply to the Catawbas and that state law shall apply to them. Furthermore, Section 5 provides that *no* federal Indian services shall be available to them, not just the services the Catawbas were receiving under the 1943 Memorandum. The majority's interpretation would improperly render this substantial portion of the act unnecessary and meaningless.[115]

The broader purpose of the Catawba act is apparent from Section 8, which provided for educational services prior to the effective date of the act to enable the Catawbas, among other things, "to conduct their own affairs" and to orient them "in non-Indian community customs." Congress explained in Section 8 that these services were authorized "to help the members of the tribe . . . to assume their responsibilities as citizens without special services because of their status as Indians." This provision of the act made it plain that the Catawbas would no longer have the same *status* as Indians entitled to federal Indian services.

---

[114] U.S. Brief at 15.

[115] Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2537 (1985).

The legislative history of the Catawba termination act confirms that the Catawba termination act did—and was intended to do—more than simply rescind the 1943 Memorandum.[116] The House and Senate Reports on the Catawba legislation explicitly describe the bill as intended to distribute tribal assets and to serve "other purposes." [117] These "other purposes," included giving the Catawbas the same legal status as other citizens of South Carolina and totally abolishing the Catawbas' special Indian relationship with the United States.[118]

Indeed, the Department of the Interior considered the cancellation of the 1943 Memorandum to be so subordinate an effect of the overall termination of the Catawbas that it was uncertain whether formal notice of the Memorandum's cancellation was even required. The Solicitor relegated the notice of the Memorandum's cancellation to an insignificant means for tying up "all the loose ends" prior to termination.[119] And, although the Department

---

[116] When the *entire* legislative history of the Catawba termination act is reviewed there can be no doubt that the Catawba act was intended to operate as a complete termination of any special status under federal law. The court of appeals majority ignored most of the legislative history of the act, consisting of hearing records, congressional debates, and other materials. These materials were before Congress at the time the legislation was being considered and are therefore probative of Congress's intent. The majority relied heavily on other materials such as a resolution by the tribe requesting the right to alienate lands and a BIA employee's minutes of a meeting with the Catawbas, which have much less bearing on congressional intent. Pet. App. at 13a-14a.

[117] H.R. Rep. No. 910, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2571.

[118] *See* above at 12-19 and nn.25-55. The majority's construction of the statute would utterly defeat Congress's overarching purpose, which was to end the Indians' status as a segregated people subject to special federal supervision, restriction and privileges.

[119] Memorandum to the Commissioner of Indian Affairs from the Solicitor of the Department of the Interior (July 22, 1960) (R. Vol. VII, Supp. Ex. A) (J.A. 147).

did send the Catawbas notice of the cancellation of the 1943 Memorandum, it also gave them notice of the revocation of their constitution and by-laws, the termination of the legal relationship between the United States and them, the termination of federal services and the application of state laws to them.[120]

B. *The Cases Relied Upon By The Majority Do Not Support The Conclusion That A Federal Trust Relationship Persisted After Termination.*

The court of appeals majority concluded that even after termination the Nonintercourse Act applied to the Catawbas and was the source of a federal trust relationship that prevented state law defenses from being raised against their claim,[121] relying chiefly, and mistakenly, upon *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*.[122] To be sure, the *Passamaquoddy* court ruled that Congress had established a trust relationship with Indians by enacting the Nonintercourse Act and that such a trust relationship existed even if federal administrative officials had not recognized the tribe or actively worked on their behalf. But *Passamaquoddy* was specifically limited to a situation where Congress had *not* directed that state law shall apply to a particular group of Indians, where Congress had *not* directed that special federal Indian statutes such as the Nonintercourse Act should thereafter be inapplicable to that group of Indians, and where Congress had *not* affirmatively acted to end any federal trust relationship. In fact, the *Passamaquoddy* court expressly limited its holding to those situations where Congress has not terminated the trust relationship.[123] Here Congress has acted.

---

[120] R. Vol. III, Ex. 29 (J.A. 137).

[121] Pet. App. at 19a.

[122] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

[123] *Id.* at 380.

The majority also purported to find support in *Menominee Tribe* v. *United States*[124] for the proposition that the trust relationship resulting from the restrictions of the Nonintercourse Act persists unless explicitly terminated. The issue decided in *Menominee*, however, was not whether a trust relationship persisted after termination. Indeed, Justice Douglas's opinion in *Menominee* did not even discuss the issue. Rather, *Menominee* held only that hunting and fishing rights acquired by federal treaty and never voluntarily relinquished by the Menominee Indians had not been extinguished by the Menominee termination act. No such treaty right is at issue here.[125]

C. *The Majority Incorrectly Concluded That This Claim Was Preserved From The Effects Of The Catawba Termination Act.*

The court of appeals majority held that the Catawba act did not affect this claim because "[T]he Act's history suggests a congressional intent not to affect any such claims."[126] However, no provision in the act preserves any claim of any kind from the effects of termination; and, when Congress wanted to preserve a claim from the effects of a termination act, it did so in plain language

---

[124] Menominee Tribe v. United States, 391 U.S. 404 (1968).

[125] The 1763 treaty with Great Britain under which the Catawbas claim their interest in the land at issue does not restrict their ability to transfer their interest, nor does it grant them a right to own property or to enforce claims under different laws than non-Indians. Treaty of Augusta, November 10, 1763, Colonial Records of North Carolina, XI, at 199 (R. Vol. V-VI, Ex. 6) (J.A. 32-7).

The Catawba termination act only made whatever rights the Catawbas held under that treaty enforceable under state laws governing the bringing of claims. As the Solicitor General pointed out, holders of federal patents to land similarly derive their interest in the land under federal law but are required to enforce their property rights subject to state law. U.S. Brief at 10.

[126] Pet. App. at 16a.

that is absent from the Catawba termination act.[127] For example, in the Ponca termination act, Congress explicitly stated that "[n]othing [in the termination act] shall affect any claims heretofore filed against the United States. . . ." [128] In the Klamath termination act, Congress explicitly provided that "[n]othing [in the termination act] shall deprive the tribe . . . of any right, privilege, or benefit [under the Indian Claims Commission Act] . . . ." [129]

Certainly, if Congress had intended to preserve any claim by the Catawbas from the effects of termination, it would have done so in similar explicit language. It did not.[130] Instead Congress provided only that "rights,

---

[127] *See, e.g.*, 25 U.S.C. § 564t (Klamath); 25 U.S.C. § 706 (Western Oregon); 25 U.S.C. § 677r (Ute Indians); 25 U.S.C. §§ 976 (Ponca Indians).

Congress used specific language in other termination acts when it intended the affected Indians to retain special rights free from the operation of state law. For example, the Klamath termination act provided that "[n]othing [in this act] shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply . . . until fifteen years after [the effective date of the termination act]. . . ." 25 U.S.C. § 564m(a). Thus, Congress specifically immunized a type of property right from the operation of state law for a certain period of time. In so doing, Congress demonstrated the ability to preserve such rights from the effects of a termination act. *See also* 25 U.S.C. § 752 (Paiute termination act shall not abrogate water rights); 25 U.S.C. § 851 (Ottawa termination act shall not abrogate water rights).

[128] 25 U.S.C. § 976.

[129] 25 U.S.C. § 564t.

[130] As the United States correctly states, Congress was not required to specifically make state law applicable to this claim. U.S. Brief at 15. "[T]he absence of congressional focus is immaterial where the plain language applies." Jefferson County Pharm. Ass'n v. Abbott Laboratories, 460 U.S. 150, 159 n.18 (1983). Congress used plain, broadly applicable language to cover whatever situations might arise after the termination act became effective. Congress could not be reasonably expected to anticipate each specific claim that might be asserted by the Catawbas.

privileges or obligations of the Tribe under the laws of South Carolina" should be unaffected by termination. The statute thus refers to and preserves only rights under *state* law, not *federal* law. If any claim was preserved, it was only a claim (or a right to bring a claim) under state law.[131]

Nor is there any basis for contending that any rights were implicitly preserved. This Court recently denied the Klamath Indians' claim to special hunting and fishing rights free of state regulation, rejecting the argument that such rights had been *implicitly preserved* because a 1901 agreement by the Indians ceding land had not mentioned those rights. The Court held that "a silent preservation" of those rights "would have been inconsistent with the broad language" of the instruments being construed.[132] Similarly, the silent preservation of this claim from the effects of the Catawba termination act would be inconsistent with the broad language of the act itself.

The majority largely based their conclusion that this claim was not affected by the termination act on the resolution passed by the Catawbas which requested that termination legislation be drafted and expressed a desire that a claim they might have against the State of South Carolina be unaffected by the legislation.[133] In fact, Con-

---

[131] In the Ponca termination act, enacted three years after the Catawba act, Congress explicitly provided *both* that state rights and obligations would be unaffected by the termination act and that federal claims would be unaffected. 25 U.S.C. §§ 976, 977. The Catawba act lacks any provision that would preserve the Catawbas' claim from the effects of termination.

[132] Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, —— U.S. ——, 53 U.S.L.W. 5106, 5111 (July 2, 1985).

[133] The resolution, adopted by the Catawbas on January 3, 1959, asked that "nothing in this legislation shall affect the status of any

gress never contemplated that a claim of any kind would be preserved from the effects of the legislation that it considered and enacted.[134] No congressman even mentioned the possibility of preserving a claim from the operation of the termination statute. The intent of *Congress*, as plainly stated in the statute and fully confirmed by examination of the materials and testimony Congress had before it, was to make state law apply to the Catawbas and to completely end any special status they may have held under federal law. The majority's conclusion

---

claim against the State of South Carolina by the Catawba Tribe." (R. Vol. III, Ex. 17) (J.A. 103). The resolution was passed by the Catawbas prior to the drafting of the legislation and was sent to BIA administrative officials.

Far more significant than the Catawbas' initial request for legislation was their vote to accept the legislation as it was enacted. In preparation for a vote on whether to implement the termination act, three years *after* its enactment and four years *after* the resolution, the Catawbas were explicitly informed that the laws of the United States which applied to tribes would no longer apply to them, that state law would apply to them, that any special relationship with the federal government would end, and that the tribe would disband as a federal tribe. 86-1 Cong. Rec. 5162 (April 7, 1959) (R. Vol. III, Ex. 22) (J.A. 116). The Catawbas voted to accept the Catawba act as it was drafted and enacted and explained to them—without any suggestion that their claim would be immune from state law.

[134] When he introduced the bill that became the Catawba termination act, Congressman Hemphill told his colleagues that the Indians had passed a resolution requesting legislation but made no mention of the resolution's request concerning a claim against the State of South Carolina. He told the other members of the House that the Catawbas desired the proposed legislation so that they could hold title to land, obtain credit more easily, and take on "the other privileges and responsibilities to which their citizenship entitles them." 105 Cong. Rec. 5162 (April 7, 1959) (R. Vol. III, Ex. 22) (J.A. 116). He reported that he had spoken with Catawba Chief Blue several times and that the Chief "wants his people to have the same privileges as other citizens." *Id.* Similarly, the House report on the bill noted that the Catawbas had passed a resolution requesting legislation without mentioning any potential claim. House Report 910 (R. Vol. III, Ex. 25) (J.A. 120-26).

that Congress intended to preserve this claim from the effects of state law is, accordingly, insupportable.[135]

V. Even If The Catawba Termination Act Had Not Made State Law Apply To The Catawbas And Their Claim, The Action Was Properly Dismissed Because The Act Ended The Catawbas' Status As A Tribe Under Federal Law.

The court of appeals majority correctly recognized that the respondent must establish that it is a tribe under federal law to maintain this action.[136] The majority failed to recognize, however, that the Catawba termination act precludes the Catawbas, as a matter of law, from proving the requisite status.

---

[135] Even assuming that the majority's strained interpretation of Section 6 had merit and that this provision operated to preserve a claim of the Catawbas arising from the 1840 treaty, the scope of this claim, as expressed by the Catawbas themselves, is far narrower than the claim they now assert. Specifically, the resolution adopted by the Catawbas requested only that "nothing in this legislation shall affect the status of any claim *against the State of South Carolina* by the Catawba tribe." (emphasis supplied). (R. Vol. III, Ex. 17) (J.A. 103). Thus, regardless of whether the Catawbas' resolution has any proper bearing on the construction of the act, it is clear that the Catawbas sought only to preserve a claim against the state and not against the many other public and private defendants named in this action.

[136] Pet. App. at 16a. Federal courts have been unanimous in holding that the establishment of present historic and continuous tribal existence is a prerequisite to maintaining an action under the Nonintercourse Act. Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Narragansett Tribe of Indians v. Southern Land Dev. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976) *citing* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). Because the Nonintercourse Act simply codified the federal common law restraint on alienation, *Oneida II*, —— U.S. ——, 53 U.S.L.W. 4225, 4227-29 (March 4, 1985), the respondent must also demonstrate its tribal status in order to avail itself of its federal common law remedies.

To qualify as a tribe under federal law a plaintiff must establish that its purported members are of the same or similar race, are a separate and distinct political entity, are a socially and culturally distinct community not assimilated into the general populace, and inhabit a particular area.[137] The distinction between a tribe under federal law, and a voluntary organization existing under state law is fundamental to federal Indian law.[138] The requirement that a putative tribe possess an independent political existence mandates that it establish a legal, political and governmental existence apart from the "general mass" of the population.[139] Indeed, it is a constitutional requirement that federal regulation of Indian affairs be based upon the existence of separate political institutions rather than a racial group consisting of Indians[140] or a voluntary social organization or association of Indians.[141]

As a result of the Catawba termination act, the Catawbas cannot be a separate and distinct political entity under federal law. Section 5 of the Catawba act specified that the tribal constitution would be revoked and provided no substitute authority or form of government. The act thereby ended the Catawbas' tribal status under federal law. In fact, the revocation of the tribal consti-

---

[137] United States v. Candelaria, 271 U.S. 432, 442 (1926), *quoting* Montoya v. United States, 180 U.S. 261, 266 (1901). *See generally* Mashpee Tribe v. New Seabury Corp., 592 F.2d at 581-88, *cert. denied*, 444 U.S. 866 (1979).

[138] *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 at n.7 (D. Mass. 1978), *aff'd sub. nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (group of Indians may be a tribe for other purposes even if it does not constitute a tribe under the Nonintercourse Act).

[139] United States v. Joseph, 94 U.S. 614, 617 (1877).

[140] United States v. Antelope, 430 U.S. 641, 646 (1977), *quoting* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

[141] United States v. Mazurie, 419 U.S. 544, 557 (1975).

tution was the clearest possible form of terminating any governmental authority the Catawbas may have had as a tribe under federal law.

Congress clearly equated revocation of the tribal constitution with the termination of tribal status under federal law. Section 5 of the act specifies that, after revocation, federal laws concerning Indians (including Indian tribes) shall be inapplicable to the Catawbas. Thus, after revocation of the tribal constitution, if the Catawbas still held the status of a tribe under federal law they would be in the unique position of a federal tribe subject to no federal law concerning Indians or Indian tribes. There is no indication of so unusual an intent in the statute or in the legislative history.

That Section 5 was understood by all affected parties to end the tribe's status as a governmental entity under federal law is confirmed by critical elements of the act's legislative history overlooked by the majority.[142] For example, the Report of the House Committee on Interior and Insular Affairs explained that the purpose of Section 8 of the act was "to provide for continuance of vocational training among the Catawbas *until the tribe disbands.*"[143] Before the Catawbas voted to accept the act, the Department of the Interior sent them a detailed explanation which specified that after termination the former tribe would no longer exist as "a legal entity which will be governed by Federal laws which refer to 'tribes'."[144] It further explained: "Nothing in the act prohibits those interested in organizing under State law

---

[142] *See* above at 12-15.

[143] H.R. Rep. No. 910, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672-73 (emphasis supplied) (R. Vol. III, Ex. 25) (J.A. 122).

[144] Attachment to letter of November 17, 1959 from Peter Walz to Program Officer Bitney (emphasis supplied) (R. Vol. III, Ex. 29) (J.A. 137).

to carry on any of the *non*governmental activities of the group." [145]

The majority mistakenly equated the tribe's ability to organize as a voluntary, *non*governmental entity under *state* law with continued tribal status under federal law.[146] But Congress understood and intended the Catawba termination act to end any status as a tribe under federal law, and the statute has been consistently construed by administrative officials to have that effect.[147] Both the plain language of the statute and the contemporaneous understanding of all affected parties compel the conclusion that the act terminated any tribal status as a governmental entity under federal law and precludes the Catawbas from asserting this claim.

CONCLUSION

The petitioners respectfully pray that the Court reverse the judgment and opinion of the court of appeals and affirm the dismissal of the action by the district court.

Respectfully submitted,

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
Attorneys for Celanese Corporation of America, et al.

JAMES D. ST. CLAIR *
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, Mass. 02109
(617) 742-9100
Attorneys for the State of South Carolina, et al.

J.D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
Attorneys for C.H. Albright, et al.

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, S.C. 29730
(803) 324-5151
Attorneys for Springs Mills, Inc., et al.

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, S.C. 29211
(803) 758-3970
Attorneys for the State of South Carolina

* Counsel Of Record For Each Petitioner

July 18, 1985

---

[145] *Id.* (emphasis supplied).

[146] Pet. App. at 18a.

[147] *See* above at 18.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-782

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

CERTIFICATE OF SERVICE

I, Lucinda O. McConathy, am a member of the Bar of the United States Supreme Court and the District of Columbia. I hereby certify that on July 18, 1985, pursuant to arrangement with the Clerk of the Court for a deferred joint appendix, I caused one typewritten page-proof copy of the Brief of Petitioners to be served on the following counsel for the parties. After the joint appendix has been prepared, printed copies of the Brief of Petitioners will be filed and served. In compliance with United States Supreme Court Rule 28, an envelope addressed to each listed address of counsel containing one copy of the Brief of Petitioners was deposited in the United States mail with first-class postage prepaid, except that a typewritten page-proof copy was sent by

Federal Express for delivery on July 19, 1985 to counsel for the Respondent, Don B. Miller, Esq., Native American Rights Fund, 1506 Broadway, Boulder, Colorado, 80302:

Jean H. Toal, Esq.
Jay Bender, Esq.
Belser, Baker, Barwick, Ravenel, Toal & Bender
1213 Lady Street
Columbia, South Carolina 29211

J.D. Todd, Jr., Esq.
Michael J. Giese, Esq.
Gwendolyn Embler, Esq.
Leatherwood, Walker, Todd & Mann
Post Office Box 2248
Greenville, South Carolina 29602

T. Travis Medlock
Attorney General
Kenneth P. Woodington, Esq.
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
Columbia, South Carolina 29211

Robert M. Jones, Esq.
123 Workman Street
Rock Hill, South Carolina 29730

Mike Jolly, Esq.
Richard Steele, Esq.
113 West Main Street
Union, South Carolina 29379

John M. Spratt, Jr., Esq.
Spratt, McKeown & Spratt
26 West Liberty Street
York, South Carolina 29745

James D. St. Clair, Esq.
James L. Quarles, III, Esq.
William F. Lee, Esq.
David H. Erichsen, Esq.
Hale and Dorr
60 State Street
Boston, Massachusetts 02109

Nolen L. Brunson, Esq.
Post Office Box 851, CSS
Rock Hill, South Carolina 29730

B. Bayles Mack, Esq.
Palmer Freeman, Jr., Esq.
Post Office Box 128
Fort Mill, South Carolina 29715

C.W.F. Spencer, Jr., Esq.
Emil W. Wald, Esq.
Post Office Box 790
Rock Hill, South Carolina 29730

David R. Duncan, Esq.
W. Ryan Hovis, Esq.
1169 West Oakland Avenue
Suite C
Rock Hill, South Carolina 29730

O.G. Calhoun, Esq.
Post Office Box 2048
Greenville, South Carolina 29602

J. Buford Grier, Esq.
Suite 200, SCN Office Center
Rock Hill, South Carolina 29731-2891

Lynn B. Dutton, Esq.
General Solicitor
Norfolk Southern Corp.
185 Spring Street, S.W.
Atlanta, Georgia 30303

David A. White, Esq.
Post Office Drawer 551, CSS
Rock Hill, South Carolina 29730

R. Carl Hubbard, Esq.
Post Office Drawer 460
Lancaster, South Carolina 29720

William I. Ward, Jr., Esq.
W. Wallace Gregory, Jr., Esq.
Post Office 33189
Charlotte, North Carolina 28242

Parker Whedon, Esq.
101 North McDowell Street
Suite 226
Charlotte, North Carolina 28204

Phillip E. Wright, Esq.
Post Office Box 150
Lancaster, South Carolina 29720

Dan M. Byrd, Jr., Esq.
Mitchell K. Byrd, Esq.
Byrd & Byrd
240 East Black Street
Rock Hill, South Carolina 29730

/s/ Lucinda O. McConathy
LUCINDA O. MCCONATHY
One Of The Attorneys For Petitioners

Dated: July 18, 1985